IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN NICHOLAS ATHAN, Appellant.	))))))))))	No. 75312-1 En Banc Filed May 10, 2007

C. JOHNSON, J.—John Nicholas Athan, appeals his conviction for second degree murder, arguing the case presents unique and fundamental issues of broad public import. Athan first argues his DNA (deoxyribonucleic acid) was collected in violation of both the United States and Washington State Constitutions when Seattle Police Department detectives, posing as a fictitious law firm, induced Athan to mail a letter to the firm, from which Athan's DNA sample was extracted. Second, Athan argues the actions of the police detectives were illegal and unfairly prejudiced his right to a fair trial, requiring dismissal of the case under CrR 8.3(b). Athan asks this court to reverse his conviction and remand the case with instructions to dismiss with

prejudice. In the alternative, Athan argues the trial court erred in several evidentiary rulings and asks this court to remand for a new trial with instructions to exclude certain evidence. We find the collection of Athan's DNA did not violate the state or federal constitution, the actions of the police did not require dismissal under CrR 8.3(b), and the trial court did not err in its evidentiary rulings. The conviction of the appellant is affirmed.

FACTUAL AND PROCEDURAL HISTORY

On November 12, 1982, Seattle police officers found the body of 13-year-old Kristen Sumstad inside a cardboard box in the Magnolia neighborhood of Seattle. Except for a pair of socks, Sumstad's body was nude from the waist down and a ligature was found around her neck. Although no DNA was found under her fingernails, semen was found in Sumstad's vagina and on her leg. An autopsy also revealed microscopic hemorrhaging or bruising in Sumstad's anus, bruising and contusions on Sumstad's face, neck, and legs, and a possible abrasion on her labia. The medical examiner estimated that Sumstad had died between 8 to 24 hours before her body was discovered. Verbatim Report of Proceedings (VRP) (Jan. 12, 2004) at 76.

The area where Sumstad's body was found, an alley behind a television store, was a hangout of local neighborhood teenagers, including Sumstad and the appellant, John Nicholas Athan. Police claim Athan's brother reported seeing Athan transporting a "large box" on a "grocery cart" near the area where Sumstad was found. VRP (Jan. 13, 2004) at 126. Athan told police that he had been in the neighborhood stealing firewood the night before Sumstad's body was found. VRP (Jan. 13, 2004) at 125-26. Although the police investigated leads related to Athan, he was not charged, and the crime remained unsolved.

Twenty years later, the Seattle Police Department's (SPD) cold case detectives unit reexamined the case and sent preserved biological evidence from the crime scene to the Washington State Patrol Crime Lab. Advances in DNA analysis allowed the lab to isolate a male DNA profile. The profile was tested against state and federal databases, but no match was found. Because Athan had been a suspect at the time of the original investigation, detectives decided to locate his whereabouts and collect a DNA sample for comparison.

The detectives located Athan in New Jersey and also determined, because Athan had family in Greece, he represented a flight risk. The detectives invented a

ruse to obtain Athan's DNA without making Athan aware they had resumed investigating Sumstad's murder. Posing as a fictitious law firm, the detectives sent Athan a letter inviting him to join a fictitious class action lawsuit concerning parking tickets. The letterhead contained the names of the "attorneys," all of whom were employed by the SPD. Believing the ruse to be true, Athan signed, dated, and returned the enclosed class action authorization form and attached a hand-written note stating, "if I am billed for any of your services disregard my signature and my participation completely." Ex. 53.

Athan's reply was received by Detective Diaz, one of the "attorneys" listed on the letterhead. Without opening it, Diaz gave the letter to another detective who forwarded it to the crime lab. A lab technician opened the letter, removed and photographed the contents, cut off part of the envelope flap, and obtained a DNA profile from saliva located on the flap. The DNA profile from the envelope matched the DNA profile from the semen found on Sumstad's body. Based primarily on the results of the DNA testing, the prosecuting attorney filed an information and probable cause statement to secure an arrest warrant for Athan.

After obtaining the warrant, two detectives flew to New Jersey to arrest

Athan. After reading Athan his *Miranda*[1] rights, but before arresting him or advising him they already had an arrest warrant for him, the detectives questioned

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Athan about Sumstad's murder. Athan denied ever having sex with Sumstad or using a grocery cart to carry a box on the night of the murder. VRP (Jan. 13, 2004) at 125-26. Athan admitted to using a handcart to steal firewood from a neighbor in the area on the night before the body was found. VRP (Jan. 13, 2004) at 125. When detectives asked Athan for a DNA sample, he stated, "I don't like where this is going," and "maybe I should call my attorney." Clerk's Papers (CP) at 253; VRP (Nov. 19, 2003) at 75. The interview ceased and the detectives arrested Athan pursuant to the arrest warrant. The detectives obtained a second DNA sample from Athan pursuant to a search warrant. The second DNA sample matched the sample from the envelope and from Sumstad's body.

The State filed first degree murder charges against Athan. Athan made several pretrial motions, including suppression of the DNA evidence and dismissal of the case under *State v. Knapstad*, 41 Wn. App. 781, 706 P.2d 238 (1985), *aff'd*, 107 Wn.2d 346, 729 P.2d 48 (1986), and dismissal under CrR 8.3(b) based on RCW 2.48.180 (unlawful practice of law), RCW 9.73.020 (opening sealed letter), due process, and public policy. The trial court denied all of the motions. Additionally, at the end of the State's case, Athan moved for dismissal which the

trial court also denied. Athan was found guilty of second degree murder and sentenced to 10 to 20 years under pre-sentencing reform act guidelines. We granted direct review of Athan's appeal.

ISSUES PRESENTED

I. Did the detectives violate the state or federal constitution when they obtained a sample of Athan's DNA without a warrant?

II. Did the trial court err when it denied Athan's motion to dismiss under CrR 8.3(b)?

III. Did the trial court err when it denied Athan's other evidentiary motions?

ANALYSIS

I. Did Detectives Violate the State or Federal Constitution when they Obtained Athan's DNA without a Warrant?

When presented with arguments under both the state and federal constitutions, we review the state constitution arguments first. *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). Under the Washington Constitution, it is well established that article I, section 7 qualitatively differs from the Fourth Amendment to the United States Constitution, and in some areas provides greater protections than does the federal constitution. *State v. McKinney,* 148 Wn.2d 20,

29, 60 P.3d 46 (2002).

Accordingly, a *Gunwall*[2] analysis is unnecessary to establish that this court should undertake an independent state constitutional analysis.[3] *State v. Jackson,* 150 Wn.2d 251, 259, 76 P.3d 217 (2003); *McKinney*, 148 Wn.2d at 26.

The only relevant question is whether article I, section 7 affords enhanced protection in the particular context. *McKinney,* 148 Wn.2d at 26-27.

A. Article I, Section 7

Article I, section 7 reads "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law" and requires a two-step analysis: was there a disturbance of one's private affairs and, if so, was the disturbance authorized

[2] *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1996) (setting forth the factors for evaluating whether an issue merits independent state constitutional interpretation).
[3] We have said while the structural differences in federal and state constitutions means the federal analysis is not binding upon our state constitutional analysis, it can still guide us because both recognize similar constitutional principles; the structural differences in state and federal constitutions may require a different analytical approach. That does not mean, however, that our result will always be inconsistent with the United States Supreme Court. *State ex rel. Gallwey v. Grimm,* 146 Wn.2d 445, 482, 48 P.3d 274 (2002).

by law. *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997). Athan argues this case involves three matters that are

"private affairs" under Washington law: one's body and bodily functions; communications with a person one believes is an attorney; and sealed correspondence intended for one's attorney. We examine each of these claims separately to determine if any one of them constitutes a "private affair" under our state constitution.

The term "private affairs" generally means "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). In determining if an interest constitutes a "private affair," we look at the historical treatment of the interest being asserted, analogous case law, and statutes and laws supporting the interest asserted. Voluntary exposure to the public is relevant to our inquiry and can negate an asserted privacy interest. *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002).

1. Body and Bodily Functions

Athan argues that case law and statutory law require us to recognize a privacy interest in one's body and bodily functions. Division One of the Court of Appeals has held, "[t]here is thus no doubt that the privacy interest in the body and bodily

functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass." *Robinson v. City of Seattle*, 102 Wn. App. 795, 819, 10 P.3d 452 (2000). *Robinson* involved a challenge to a pre-employment urinalysis drug testing program, which the court partially invalidated. The appellate court noted the testing was highly invasive in the taking of the sample, the chemical analysis of its contents, and the possible disclosure of explanatory medical conditions or treatments. *Robinson*, 102 Wn. App. at 822. Athan submits that all three of the appellate court's concerns are present here. Athan also argues that, except for convicted felons under RCW 43.43.754 and court ordered parentage tests under RCW 26.26.400, no person is subject to DNA testing without consent in the state of Washington.

The State distinguishes *Robinson* by arguing the drug-testing program in that case involved the nonconsensual taking of urine samples. The statutes, likewise, are distinguishable because they involve the taking of biological samples by force. In this case, the State argues, Athan voluntarily relinquished his DNA when he licked the envelope and mailed it to a third party. The State maintains that DNA obtained from one's saliva is akin to a person's physical description, appearance, or other

characteristic voluntarily exposed to the public, thus, it is not a "private affair" at all. *See, e.g., State v. Carter*, 151 Wn.2d 118, 126, 85 P.3d 887 (2004).

We find there is no inherent privacy interest in saliva. Certainly the nonconsensual collection of blood or urine samples in some circumstances, such as under the facts of *Robinson*, invokes privacy concerns; however, obtaining the saliva sample in this case did not involve an invasive or involuntary procedure. The relevant question in this case is whether, when a person licks an envelope and places it in the mail, that person retains any privacy interest in his saliva at all. Unlike a nonconsensual sampling situation, there was no force involved in obtaining Athan's saliva sample here. The facts of this situation are analogous to a person spitting on the sidewalk or leaving a cigarette butt in an ashtray. We hold under these circumstances, any privacy interest is lost. The envelope, and any saliva contained on it, becomes the property of the recipient.

Amicus[4] American Civil Liberties Union (ACLU) argues DNA has the

[4] The American Civil Liberties Union is joined by the Washington Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers, and the Washington State Bar Association (WSBA) as amicus curiae. Athan expressly adopted the arguments of the amici in his reply brief.

potential to reveal a vast amount of personal information, including medical conditions and familial relations, therefore DNA should constitute a privacy interest. While this may be true in some circumstances, the State's use of Athan's DNA here was narrowly limited to identification purposes. What was done with the letter, including DNA testing for the limited purpose of identification, was not within the sender's control. The concerns raised by the ACLU, while valid, are not present in this case. The State used the sample for identification purposes only, not for purposes that raise the concerns advanced by the ACLU.

2. Communications with a Person one Believes is an Attorney

Athan argues Washington law provides a strong privacy protection of communications between attorneys and their clients. *See* RCW 5.60.060(2)(a). Although the police officers here were not actually attorneys, they held themselves out as attorneys, in violation of RCW 2.48.180(2)(a). Athan contends he reasonably relied on the detectives' representations that they were attorneys, and thus he should be entitled to rely on the attorney-client privilege to protect his communications as a "private affair."

The State argues the saliva used to seal the envelope was not a

communication and therefore not protected by the attorney-client privilege. The communication, if any, would have been the enclosed letter, which the State notes Athan never moved to suppress at trial. Finally, the letter contained a handwritten note stating, "[i]f I am billed for any of your services disregard my signature and my participation completely." Ex. 53. The State suggests this added condition of not wanting to be billed by the "firm" is evidence Athan did not intend to form an attorney-client relationship at that time; instead, he sought merely to preserve his chance to be involved in the lawsuit at some future date.

As the State notes, Athan did not object to the letter, or its contents, being admitted during the trial. Thus, we need only decide if the saliva on the envelope flap is a "communication" subject to protection by the attorney-client privilege. Because we find saliva is not a communication in this case, we do not need to decide if an attorney-client relationship was even established. We note this case is not about police intercepting mail addressed to someone else. The envelope, its contents, and the saliva contained on it, were addressed to and received by the SPD detectives, albeit through the use of a ruse.

When there is no statutory definition to guide us, words should be given their

ordinary meaning. Often, we rely on dictionaries to supply the ordinary meaning. *State v. Gurske*, 155 Wn.2d 134, 145, 118 P.3d 333 (2005) (Sanders, J., concurring). "[C]ommunication" may be defined as "[t]he expression or exchange of information by speech, writing, or gestures." *Black's Law Dictionary* 296 (8th ed. 2004). Under the facts of this case, Athan's saliva was merely a means by which he could seal the envelope. There was no intent or expectation on Athan's part that his saliva would be an expression or exchange of information. Although the State was ultimately able to gain information from the saliva, it does not mean the saliva was a "communication" as it is ordinarily defined.

Athan argues he was entitled to rely on the SPD representation that they were attorneys and thus anything sent to them would be protected by the attorney-client privilege. Relying on RCW 5.60.060(2)(a), regarding attorney-client privilege, and RCW 2.48.180(2)(a), regarding unlawful practice of law, and case law, Athan contends police officers posing as attorneys is a ruse strictly prohibited by both Washington law and the law of evidence in general.

The State distinguishes Athan's cited cases by noting the cases all involved actual communications. In *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963), jail

officers eavesdropped on conversations between the defendant and his attorney. In *State v. Granacki*, 90 Wn. App. 598, 959 P.2d 667 (1998), a police detective intentionally read a legal pad containing privileged notes between the defendant and his attorney. Thus, the State contends, neither case is on point because the facts here do not involve police obtaining actual attorney-client communications. The State also distinguishes *People v. Barker*, 60 Mich. 277, 27 N.W. 539 (1886) (detective posed as criminal defense attorney to obtain statements from the defendant) and *State v. Russell*, 83 Wis. 330, 53 N.W. 441 (1892) (prosecutor posed as defendant's attorney in order to obtain statements about the case) because those cases involved the receipt of privileged information.

We find there is no absolute prohibition of police ruses involving detectives posing as attorneys in the state of Washington. While such a ruse has the potential to gather privileged and confidential information, thereby implicating the concerns raised by Athan and amici, that was not the case here. First, we have already found the saliva on the envelope was not a communication. Second, the letter sent to Athan did not ask Athan to provide additional or confidential information. Thus, the detectives were not seeking a confidential communication and the risk of receiving

such a communication was minimal. Unlike *Barker* and *Russell*, the ruse was not designed to obtain statements or other confidential information about the Sumstad murder; the goal of the ruse was only to induce Athan to mail an envelope. The use of the ruse did not violate a private affair protected by article 1, section 7.

We find further support for police posing as an attorney in the analogous case of *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002). In *Townsend*, a Spokane police officer, posing as a 13-year-old girl, engaged in on-line communications with the defendant, Townsend. The police officer saved and later printed the communications for use as evidence against Townsend. Townsend argued the police detective's actions violated Townsend's privacy rights under a similar provision of the state privacy act. In upholding his conviction, we found the communications were private, but that Townsend impliedly consented to the recording of his private email conversations because it was reasonable to infer Townsend was aware it was possible to record the messages. *Townsend*, 147 Wn.2d at 674-79. Like Townsend, who presumably was not aware his emails were being sent to and recorded by a police detective for use as evidence against him, Athan impliedly consented to the receipt of his saliva because he mailed it. The fact

that he was not aware the recipient was a police detective does not vitiate that consent.

As we note in our discussion of Athan's CrR 8.3(b) motion, police officers are allowed to use some deception, including ruses, for the purpose of investigating criminal activity. Generally, ruses are upheld as long as the actions do not violate a defendant's due process rights. Because we agree with the trial court that the police ruse used here did not violate Athan's due process rights, we find this ruse permissible.

3. Sealed Correspondence

Finally, Athan argues that, under RCW 9.73.020, his letter was protected. Athan relies on *State v. Christensen*, 153 Wn.2d 186, 198, 102 P.3d 789 (2004), to argue the state privacy act protects "sealed messages, letters, and telegrams from being opened or read by someone other than the intended recipient." According to Athan, a law firm was his intended recipient, not the police. Because the police were not the intended recipients, he argues they violated the act by opening the letter and, at the same time, violated his privacy rights.

The State argues the letter was in fact opened by the intended recipient

because it was opened by the detectives listed in the "law firm's" letterhead or by their agents. The State finds it immaterial that the persons designated in the letterhead were detectives and not attorneys.

RCW 9.73.020 reads, "[e]very person who shall wilfully open or read, or cause to be opened or read, any sealed message, letter or telegram intended for another person, or publish the whole or any portion of such a message, letter or telegram, knowing it to have been opened or read without authority, shall be guilty of a misdemeanor." Nothing in the statute indicates the intended recipient must be who the recipient actually claims to be. The detective who actually received the letter was listed on the "law firm" letterhead and thus, under the state privacy act, had authority to open or cause to be opened, the letter. Since the letter was received by the intended addressee, though not an attorney as Athan believed, he has failed to establish a statutory violation.

We are again reminded of *Townsend*. Townsend argued the police detective's actions violated Townsend's privacy rights under a similar provision of the state privacy act. In upholding his conviction, we found the communications were private, but that Townsend impliedly consented to the recording of his private

e-mail conversations because it was reasonable to infer Townsend was aware it was possible to record the messages. Notably, our holding did not turn on Townsend's subjective belief he was communicating with a child and not a police detective. *Townsend*, 147 Wn.2d at 674-79. Similarly, Athan's privacy act claim here does not turn on his subjective belief he was corresponding with a law firm. The detectives listed on the letterhead were the intended recipients of the letter; their actual occupation is immaterial for the purposes of RCW 9.73.020.

Having found there is no privacy interest in saliva after it has been voluntarily placed on an envelope and relinquished to a recipient; the act of placing saliva on an envelope to seal the envelope does not constitute a "communication" under the ordinary meaning of the word; and the police did not violate RCW 9.73.020 because the detective named on the letterhead was the intended recipient, we conclude Athan's private affairs were not disturbed under article I, section 7. We now examine if his rights were violated under the Fourth Amendment.

B. Fourth Amendment

The Fourth Amendment reads, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Athan asserts two privacy rights were violated under the federal constitution: bodily privacy and privacy of the mail. Each asserted right will be analyzed to determine if a search occurred, and if so, if the search was unreasonable under the Fourth Amendment.

There is no United States Supreme Court opinion directly addressing this issue so we apply established Fourth Amendment principles to guide our analysis. A Fourth Amendment search does not occur unless there is a subjective manifestation of privacy in the object searched and society recognizes that privacy interest is reasonable. *Kyllo v. United States*, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). Additionally, the Fourth Amendment protects against unreasonable searches. Reasonableness is determined by examining the totality of the circumstances, including the degree to which the search intrudes upon an individual's privacy and the degree to which the search is needed for the promotion of legitimate governmental interests. *United States v. Knights*, 534 U.S. 112, 118-19, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001). Thus, a Fourth Amendment violation

occurs only when there is a reasonable privacy interest protected and the search of that interest is unreasonable in light of all the circumstances.

1. Bodily Privacy

Athan argues the collection and analysis of biological samples from an individual constitutes a search under the Fourth Amendment. He contends that because the letter and, consequently, his DNA were obtained and examined without a warrant, they were unreasonable searches and thus, in violation of Fourth Amendment protections.

The State argues Athan had no reasonable expectation of privacy in his saliva when he voluntarily placed it on an envelope and mailed it. The State also argues the use of the police ruse here did not vitiate the voluntary nature of Athan's surrender of his saliva.

While case law exists supporting Athan's assertion that forcible collection of bodily fluids constitutes a search under the federal constitution, *see, e.g.*, *Vernonia School Dist. 47j v. Acton*, 515 U.S. 646, 652, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995), no cases have been cited dealing with the voluntary relinquishment of a bodily fluid which is collected without force or invasion and analyzed by the

government. Similar to our state constitution approach, the question under the Fourth Amendment is whether persons retain a reasonable expectation of privacy in their saliva after they lick an envelope and place it in the mail. We find no cases or support for such a conclusion. Police may surreptitiously follow a suspect to collect DNA, fingerprints, footprints, or other possibly incriminating evidence, without violating that suspect's privacy. No case has been cited challenging or declaring this type of police practice unreasonable or unconstitutional. People constantly leave genetic material, fingerprints, footprints, or other evidence of their identity in public places. There is no subjective expectation of privacy in discarded genetic material just as there is no subjective expectation of privacy in fingerprints or footprints left in a public place. Physical characteristics which are exposed to the public are not subject to Fourth Amendment protection. *United States v. Mora*, 410 U.S. 19, 21, 93 S. Ct. 774, 35 L. Ed. 2d 99 (1973). The analysis of DNA obtained without forcible compulsion and analyzed by the government for comparison to evidence found at a crime scene is not a search under the Fourth Amendment. *See State v. Coleman*, 122 Ariz. 130, 593 P.2d 684, 687 (Ct. App. 1978) (finding analysis of shoe soles does not constitute Fourth Amendment search because the

"[e]xamination of such physical characteristics 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or search'" (quoting *Davis v. Mississippi*, 394 U.S. 721, 727, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969))).

2. Mail

Athan argues he had a reasonable expectation of privacy in the envelope he mailed to the "law firm." He relies on *Ex Parte Jackson*, 96 U.S. 727, 733, 24 L. Ed. 877 (1878), and *United States v. Van Leeuwen*, 397 U.S. 249, 90 S. Ct. 1029, 25 L. Ed. 2d 282 (1970) for the proposition that sealed letters and packages cannot be searched without a warrant.

The State argues, as it did in the state constitution claim, no violation exists because the detective who received the letter was named in the letterhead and thus, was an intended recipient of the envelope. The State distinguishes the cases relied on by Athan because here the SPD did not intercept and search the contents of a letter being sent to a third party. It is of no consequence that Athan did not know the intended recipient was a detective and not a lawyer, according to the State.

The Fourth Amendment protects a person's privacy interests in the contents

of sealed letters and documents sent through the mail. *See e.g.*, *Van Leeuwen*, 397 U.S. at 251. However, a similar analysis from Athan's state constitution mail claim applies here. The detectives were listed on the envelope as the intended recipients; no interception of the letter while it was in transit to a third party occurred. There is no Fourth Amendment violation when, as here, the police open and analyze a sealed letter addressed to one or more of their detectives.

II. Did the Trial Court Err when it Denied Athan's Motion To Dismiss under CrR 8.3(b)?

CrR 8.3(b) reads, "[t]he court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." We review the trial court's decision under an abuse of discretion standard. Abuse of discretion requires the trial court's decision to be manifestly unreasonable or based on untenable grounds or untenable reasons. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). Here, the trial court, in a written opinion, discussed the public policy of allowing some deceitful police conduct in order to detect and eliminate criminal

activity. The court distinguished the facts of this case from other attorney-client cases because the police were not hoping to obtain confidential information, rather they were trying to obtain a sample of saliva. The court denied Athan's motion to dismiss because, after looking at a totality of the circumstances, it found the police were acting to protect the public by solving the crime, the illegal activity engaged in was only a misdemeanor, and the police conduct was not repugnant to a sense of justice.

Athan argues his case should be dismissed under CrR 8.3(b) and the due process clauses of the state and federal constitutions. Athan notes the rule requires two elements: governmental misconduct and prejudice affecting the defendant's right to a fair trial. Athan maintains governmental misconduct is shown through the SPD's violation of RCW 2.48.180(2)(a), unlawful practice of law, and RCW 9.73.020, privacy in sealed letters. In addition, Athan argues the case should be dismissed for public policy reasons. Athan, along with amicus WSBA, contends the ruse used by police created an attorney-client relationship because Athan believed the "law firm" would be representing him in a class action lawsuit. Athan and the WSBA contend public policy allows for some deceitful conduct only when it is

necessary to detect criminal activity and the specific ruse used here was not necessary to obtain the evidence the SPD wanted. Based on the strong interest in protecting the public's faith in the attorney-client relationship, Athan argues public policy requires dismissal of the case.

The State contends dismissal for a due process violation requires the additional element of showing the government misconduct is "so shocking that it violates fundamental fairness." *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). Dismissal is appropriate only in the most egregious of cases, such as where the government agents direct a crime from beginning to end or a crime is fabricated for the sole purpose of obtaining a conviction and not to protect the public from criminal behavior. *Lively*, 130 Wn.2d at 20-21. The State notes Washington courts have repeatedly rejected outrageous conduct claims based on police engaging in illegal activities. *See, e.g.*, *State v. Myers*, 102 Wn.2d 548, 689 P.2d 38 (1984), *overruled on other grounds by Lively,* 130 Wn.2d 1. Thus, while the State concedes the police conduct was perhaps deceitful, it was not so outrageous as to warrant dismissal of the entire case. The State observes the police ruse was not designed to solicit any privileged information and, in fact, none was communicated

by Athan.

Public policy allows for a limited amount of deceitful police conduct in order to detect and eliminate criminal activity. A violation of a criminal statute is not a per se violation of CrR 8.3(b) and/or due process, and we must examine the totality of the circumstances to determine when the conduct becomes so outrageous that a reversal of a conviction is required. The police's use of a ruse to obtain evidence against a suspect is not determinative. We have upheld police ruses designed to gain warrantless entry into a suspect's house for the purpose of buying illegal drugs. *State v. Hastings*, 119 Wn.2d 229, 830 P.2d 658 (1992). In *Hastings*, we found the Fourth Amendment did not apply because the defendant had no reasonable expectation of privacy in his house when he was openly engaged in illegal activity with the public. However, we noted that even if the Fourth Amendment had applied, the defendant had consented to the search and the police ruse used to gain entry did not vitiate that consent. *Hastings*, 119 Wn.2d at 233-36. Likewise, there is no Fourth Amendment violation here and the police ruse does not vitiate Athan's voluntary relinquishment of the envelope containing a sample of his saliva. Although the police violated a state statute by posing as lawyers, the trial court

noted the effect of the conduct on the integrity of the legal system is not as severe as where the ruse was directed at obtaining confidential information. Public policy allows for some deceitful conduct and violation of criminal laws by police officers in order to detect and eliminate criminal activity. The claimed misconduct in this case does not involve actions similar to those cases which found misconduct warranting dismissal. The police did not induce Athan to commit any crime here nor did they attempt to gain any confidential information from the ruse. The conduct here is not so outrageous as to offend a sense of justice or require dismissal of this case. We find the trial court properly denied Athan's motion to dismiss under CrR 8.3(b).

III. Did the Trial Court Err when it Denied Athan's Other Evidentiary Motions?

In addition to his DNA claims, Athan raised four evidentiary issues on appeal. He claims the trial court erred by denying his motion to dismiss for insufficiency of the evidence; admitting statements he made at the time of his arrest; admitting hearsay statements made by the decedent about Athan; and admitting statements made by Athan's brother, James, to police during the original investigation.

A. Sufficiency of the Evidence

Athan argues the State failed to produce sufficient evidence to prove he was guilty beyond a reasonable doubt.[5] Athan maintains the evidence establishes only that he had a sexual encounter with the victim, Kristen Sumstad, at some point during the 24 hours preceding her death. However, according to Athan, the fact of sexual intercourse is insufficient to show Athan killed Sumstad. Athan argues there was no testimony that the intercourse occurred concurrently with the death, no testimony placing Athan at the scene of the crime on the morning the body was found, and no testimony placing Athan with the victim in the days immediately preceding her death. Athan also notes there was no DNA evidence found on the ligature used to strangle Sumstad nor was any found under her fingernails. Finally, Athan contends the evidence showed he was a pleasant, hard-working boy who was dating the victim's older sister.

The State argues the evidence was not only sufficient as to Athan's guilt, it

[5] Athan does not specify in his brief if he is appealing the trial court's denial of his pretrial *Knapstad* motion or his mid-trial motion to dismiss or if he is raising an entirely separate appeal for insufficiency of the evidence. However, each would be reviewed under the same standard, so determining which motion he is appealing is not necessary.

was overwhelming. The State notes that for a sufficiency of the evidence challenge, a reviewing court must view the evidence in the light most favorable to the State. Only if the court finds no rational trier of fact could have found guilt beyond a reasonable doubt will the conviction be overturned for insufficiency of the evidence. *State v. Ward*, 148 Wn.2d 803, 815, 64 P.3d 640 (2003). The State argues the evidence showed sexual intercourse between Athan and Sumstad near the time of the murder and the body was found near Athan's residence in a place he was known to frequent. In addition, Sumstad's body showed evidence of a sexual assault and the semen found on the body conclusively matched Athan's DNA where Athan repeatedly denied having a sexual relationship with the victim both during the initial investigation and 20 years later when questioned in New Jersey.

We find that, when viewing the evidence in the light most favorable to the State, the evidence was sufficient such that a reasonable jury could have found Athan guilty beyond a reasonable doubt. The trial court properly denied each of Athan's motions to dismiss based on the sufficiency of the evidence.

B. Athan's Statements

Athan argues statements made prior to his arrest in New Jersey should have been suppressed. He contends his Sixth Amendment right to counsel had attached because, although he was not aware of it, he had been formally charged with first degree murder and he was indisputably in police custody. Although the police read Athan his *Miranda* rights, Athan refused to sign a waiver of those rights. He relies primarily on *United States v. Heldt*, 745 F.2d 1275 (9th Cir. 1984), for the proposition that refusal to sign a waiver form is an indication that a person wishes to remain silent. He argues he did not waive his rights, thus, any statements made to the police were admitted at trial in violation of the Sixth Amendment.

The State argues Athan made a voluntary, knowing, and intelligent waiver of his *Miranda* rights when he voluntarily answered police questions and, after being asked for a DNA sample, unequivocally invoked his *Miranda* rights. The State maintains that refusal to sign a waiver is not dispositive of the waiver issue and courts also look to evidence of coercion or threats on the part of the police. *See, e.g.*, *State v. Rupe*, 101 Wn.2d 664, 678, 683 P.2d 571 (1984). In addition, the Ninth Circuit Court of Appeals later distinguished *Heldt* on the grounds that there

were a number of other circumstances indicating the statements were not voluntarily made. *United States v. Andaverde*, 64 F.3d 1305, 1313-14 (1995). Here, the State contends, there was no evidence or allegation of police coercion and Athan later invoked his rights, suggesting he was aware that he had not previously invoked them.

The State bears the burden of showing a knowing, voluntary, and intelligent waiver of *Miranda* rights by a preponderance of the evidence. Refusal to sign a waiver may cast doubt on the State's assertion of waiver; however, it is not dispositive of the issue because the trial court must review the totality of the circumstances. *State v. Parra*, 96 Wn. App. 95, 99-100, 977 P.2d 1272 (1999). We will not disturb a trial court's conclusion that a waiver was voluntarily made if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding. *See State v. Broadaway,* 133 Wn.2d 118, 129, 942 P.2d 363 (1997). There is no evidence that the detectives coerced Athan into answering their questions and Athan's subsequent invocation of his *Miranda* rights supports a finding that he knowingly, voluntarily, and intelligently waived his right to remain silent prior to that point.

C. Decedent's Statements

During trial, Athan objected to the testimony of state witnesses Terri Droll Presnell and Kimberly Alguard, who both testified to statements made by the victim, Sumstad, about Athan. Presnell testified that when she teased Sumstad about Athan's romantic interest in Sumstad, Sumstad replied "no way," that she (the decedent) would not go out with him, and it was a joke. VRP (Jan. 14, 2004) at 27. Alguard testified that three or four days before Sumstad's body was discovered, Sumstad told Alguard, in reference to Athan, "this guy gives me the creeps." VRP (Jan. 15, 2004) at 84. The trial court overruled the objections and allowed the statements into evidence under the state of mind exception to the hearsay rule. Athan argues it was error to allow the statements because the state of mind exception to the rule does not apply and because the statements violate his Sixth Amendment confrontation rights.

1. Hearsay

Athan argues the state of mind exception to the hearsay rule, ER 803(a)(3), applies only when the declarant's state of mind is at issue. In homicide cases, this requires a defense of either accident or self-defense. *State v. Parr*, 93 Wn.2d 95,

103, 606 P.2d 263 (1980). Athan concludes that, because he did not use a defense of accident or self-defense, Sumstad's state of mind was not at issue and the exception could not apply. Athan also contends that even if the statements were relevant, they were improper because there was no limiting instruction accompanying them. Athan maintains the admission of the statements constitutes an error that is not harmless.

The State argues Athan put Sumstad's state of mind into issue by suggesting the evidence could only prove he had sex with the victim but it could not show assault, rape, or murder.[6] According to the State, Athan's strategy was to argue he and Sumstad had consensual sex at some point before her murder, but that he did not murder her. Additionally, the statements were relevant to Athan's motive. Under the State's theory of the case, Athan sexually assaulted Sumstad and then murdered her for several possible reasons: to prevent her from reporting the assault,

[6] Although the record does not contain a transcript of the opening arguments, the record sufficiently supports the conclusion that Athan's defense strategy from the outset of the case was consensual sex. During cross-examination of several witnesses, Athan's attorney highlighted the possibility of a significant lapse of time between the sexual encounter and the murder, the possibility that Sumstad was a sexually active girl, and the lack of additional DNA evidence on the ligature. Finally, during closing arguments, Athan's attorney noted Athan was not charged with rape or assault. VRP (Jan. 20, 2004) at 92.

because she was struggling during the assault, or because she was making too much noise. Although motive is not an element of murder, it is often necessary when only circumstantial evidence is available. *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995). The State contends Athan may not object to the lack of a limiting instruction because he failed to request one during trial. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Finally, the State maintains any error from admitting the statements is harmless. According to the State, substantial evidence existed to suggest the murder occurred during a sexual assault: the victim's body displayed injuries near her vagina and anus; the body was found nude from the waist down; and the victim still had her purse and jewelry, suggesting robbery was not a motive.

Out-of-court statements offered to prove the truth of the matter asserted are generally inadmissible as hearsay unless they fall under a recognized exception to the hearsay rule. ER 801, 802. The trial court's decision to admit the evidence is reviewed for abuse of discretion and will not be overturned unless its discretion is manifestly unreasonable or based upon untenable grounds. *Powell*, 126 Wn.2d at 258. We cannot say the trial court abused its discretion by allowing the statements under the state of mind exception to the hearsay rule because Athan himself put the

victim's state of mind into issue. Athan's trial strategy was to suggest a relationship between himself and the victim and to try to distance the sexual encounter he had with the victim with her subsequent murder. By suggesting a relationship between himself and Sumstad, Athan made Sumstad's statements concerning her feelings toward Athan relevant. The trial court did not abuse its discretion by allowing this hearsay evidence because the defendant made the victim's feelings toward him a relevant issue. Although a limiting instruction on such evidence is generally required, the failure of a court to give a limiting instruction is not error when no instruction was requested. *Myers*, 133 Wn.2d at 36. Because Athan failed to request a limiting instruction during the trial, he is precluded from arguing it was harmful error here.

2. Confrontation Clause

Athan argues his Sixth Amendment rights were violated when the nontestimonial statements of the victim were admitted because they did not bear adequate indicia of reliability. Athan's argument hinges on our finding above because reliability of a hearsay statement is presumed if it falls within a recognized exception to the hearsay rule. *State v. Whelchel*, 115 Wn.2d 708, 715, 801 P.2d

948 (1990). Because we find the statements were properly admitted under the state of mind exception to the hearsay rule, Athan's claim fails. We note *Crawford* is not implicated here because the statements were nontestimonial. *See Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether" (emphasis added)).

D. Athan's Brother's Out-of-Court Statements

Sometime shortly after the victim's body was discovered, Athan's brother, James Athan (James), told Officer McGee, a Seattle Police Officer, that he saw Athan the evening before the body was discovered in the area pushing a cart with a large box on it. VRP (Jan. 13, 2004) at 126. In a 2003 interview, James clarified his statement by saying he saw Athan several nights before the body was discovered, not the night before. CP at 108. Neither James nor Officer McGee testified at Athan's trial. However, James' statement to Officer McGee was referenced in the testimony of two witnesses. First, Detective Mixsell, in describing

the questioning of Athan before he was arrested in New Jersey, testified to asking Athan about James' statement and Athan's response. VRP (Jan. 13, 2004) at 126. Second, Detective Wallock testified that he was asked to interview Athan the day after the body was discovered based on information received from James. VRP (Jan. 13, 2004) at 148-49. Detective Wallock did not testify to the content of the information received from James though he did testify that Athan, during this interview, admitted he had been in the neighborhood on the evening prior to the body being discovered with a cart for the purpose of collecting firewood. VRP (Jan. 13, 2004) at 149. No one directly testified to seeing Athan the night before the body was found pushing a cart with a large box on it.

1. Hearsay

Athan argues testimonial hearsay statements against a defendant are not admissible unless the witness is no longer available and the defendant had a prior opportunity to examine the witness. *Crawford*, 541 U.S. at 59. Athan contends James' statement was testimonial for several reasons. First, it was reasonable for an objective witness to believe the statement would be available for use at a later trial. Second, it was a pretrial statement that the declarant could reasonably believe would

be used prosecutorially. Finally, it was a statement made to a police officer in the course of an investigation. *See Crawford*, 541 U.S. at 51-52 (explaining what kind of statements should qualify as "'testimonial'"). Athan concludes that because the statement was testimonial and James was available at trial, the evidence was not admissible. Under *Crawford*, Athan argues, his Sixth Amendment right to confront any witness against him was violated.

The State first argues the statements were not testimonial because they were not made pursuant to a formal interrogation. Rather, James happened to encounter Officer McGee at around 4:00 a.m. and was still emotional from hearing the news of Kristen's death. CP at 268, 270. Second, the State argues that even testimonial evidence may be admitted if it is not being used to prove the truth of the matter asserted. *Crawford*, 541 U.S. at 60 n.9. The State contends Detective Wollack did not testify as to the contents of James' statements and was merely explaining why he questioned Athan at that time. Testimony that does not disclose the contents of the hearsay and is used to provide background does not violate the Sixth Amendment. *See United States v. Cromer*, 389 F.3d 662, 675-76 (6th Cir. 2004). The State contends Detective Mixsell's testimony also did not violate the Sixth

Amendment because, although he disclosed the contents of James' statement, he did so to provide context to Athan's answer to the question. Athan's answer would be admissible under ER 801(d)(2) and without the context of James' statements, Athan's response would not make sense. Statements not used to prove the truth of the matter asserted, but instead used to provide context to a defendant's otherwise admissible statement do not violate the Sixth Amendment. *See State v. Smith*, 162 Ohio App.3d 208, 832 N.E.2d 1286, 1291 (2005).

Because our analysis here does not turn on whether the statement is testimonial, we assume without deciding that it is. Detective Wollack testified he was asked to question Athan the day after the body was discovered based on information the police had received from James. VRP (Jan. 13, 2004) at 148. Wollack also confirmed he asked Athan if he had been in the area of the television store the night before the body was discovered. VRP (Jan. 13, 2004) at 149. Wollack testified Athan said he had been in the area collecting firewood. VRP (Jan. 13, 2004) at 149. We find no violation of Athan's Sixth Amendment rights during this exchange. The content of James' statement was not revealed to the jury during this exchange so arguably, the testimony does not even qualify as hearsay. The

reference to James' statement was made in passing as an explanation of why Detective Wollack was questioning Athan. *See Cromer*, 389 F.3d at 675-76. We agree with the *Cromer* court's holding that testimony which does not disclose the content of hearsay and is referenced only to provide context or background to the testimony is not a *Crawford* violation.

Unlike Detective Wollack, Detective Mixsell was revealing the content of James' statement to the jury. In a narrative answer, Mixsell testified to the following:

> I told him that--I'm sorry, I told John Athan his brother saw him with a large box on a grocery cart, that his brother had told detectives he saw him with the cart and box the night before. John Athan said: That's ridiculous, and no way, never.

VRP (Jan. 13, 2004) at 126. In this context, the statement comes closer to being used to prove the truth of the matter asserted and, therefore, improper. The State gives two alternative reasons for the statement: to give context to the defendant's response and to show how the defendant's story changed from 1982 to this interview in 2003. The fact that the statement may serve more than one purpose does not negate its use to prove the truth of the matter asserted. However, at most,

the effect of the statement is to place Athan in the area where the body was found, with a cart and a box, something Athan admitted to. Athan's initial statements to the police in 1982 are entirely consistent with this testimony. The testimony, in context, does not go to prove any material fact in dispute. Under these circumstances, *Crawford* is not implicated.

CONCLUSION

We find the DNA evidence admissible under both the state and federal constitutions. No recognized privacy interest exists in voluntarily discarded saliva and a legitimate government purpose in collecting a suspect's discarded DNA exists for identification purposes. Although the ruse used by detectives in this case violated certain statutes, it was not so outrageous or shocking as to warrant dismissing the case under CrR 8.3(b). We find the evidence presented by the State was sufficient to prove Athan was guilty beyond a reasonable doubt of second degree murder. Athan's motion to dismiss for insufficiency was properly denied. We find Athan made a valid waiver of his *Miranda* rights when he voluntarily spoke with police and later invoked his rights to end the questioning. We hold it was not error to allow statements made by the decedent into evidence when Athan put the

decedent's feelings toward him in issue by suggesting they engaged in consensual sex and the statements fell under the state of mind exception to the hearsay rule. Finally, assuming the statement made by James to Officer McGee was testimonial hearsay, the testimony of Detective Wollack did not reveal the content of James' statement and Detective Mixsell's testimony regarding James' statement does not implicate *Crawford* because the statement was consistent with Athan's own admissions. The conviction of the appellant is affirmed.

Cause No. 75312-1

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:

Justice Susan Owens

Justice Barbara A. Madsen

Justice James M. Johnson

Justice Bobbe J. Bridge